**SULAIMAN CHIK**

**v.**

**ANG AH CHOO**

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 497 OF 1980]
14 FEBRUARY 1989

***TORT:*** *Negligence - Road traffic accident - Whether on the facts the plaintiff was negligent in causing accident - Whether the defendant owed a duty to the plaintiff to keep a proper look out - Plaintiff discharging from hospital against medical advice and using traditional medicine - Whether plaintiff's injuries aggravated by this.*

The plaintiff alleged that he was riding his bicycle along Jalan Simpang Empat, Seberang Perai on the left hand side when the defendant driving a Motorlorry No. PM 7385 coming from the opposite direction encroached onto his side of the road and collided into him. The defendant on the other hand alleged that as the plaintiff approached him the plaintiff suddenly swerved and encroached onto his path and in order to avoid the collision the defendant swerved to the right but his right nearside collided with the cyclist.

The plaintiff suffered a compound fracture of the radius and ulna with ragged irregular transverse laceration. He also suffered a laceration over the parietal region and on the outer canthus of the right eye. There were also abrasions on the left shoulder blade and elsewhere and puncture wounds in the right thigh.

The plaintiff discharged himself from the hospital against medical advice and used traditional medicine which according to the evidence given had aggravated the injury to the radius and ulna.

**Held:**

**[1]** On the facts of the case the plaintiff was held 2/3 liable as the defendant's version of events was more probable. However the defendant was found to be 1/3 liable as he ought to have kept a proper look out for the plaintiff which he ought in the circumstances to have seen.

**[2]** That the plaintiff had aggravated his injuries by discharging himself from the hospital against medical advice and seeking traditional medicine.

**[3]** Accordingly the general damages for the injuries was found to be RM13,500 which was reduced to RM12,000 for overlapping and as the plaintiff was found to be 2/3 liable judgment would be entered for the plaintiff in the sum of RM4,000 with the interest at 6% per annum from date of service of writ until judgment and thereafter at 8% per annum until full payment.

**Cases referred to:**

*Selvanayagam v. University of West Indies (PC) [1983] 1 MLJ 585*
*Tan See Peng v Tang Yong Muang [1982] Dass Vol 3 Pg 71*

*For the plaintiff - Lim Ewe Hock with Rhina Bhar; M/s. Shahinuddin & Ranjit*
*For the defendant - Paul Manecksha; M/s. V.P. Nathan & Partners*

**JUDGMENT**

**Mohamed Dzaiddin J:**

This is a simple claim of negligence arising out of collision on 1 November 1977 at about 8 p.m. along Jalan Simpang Empat, Permatang Buloh, Seberang Perai between a plaintiff cyclist and Motorlorry No. PM 7385 driven by the defendant. As a result of this collision, the plaintiff suffered injuries, loss and damage.

By his statement of claim filed on 31 December 1980 the plaintiff stated that at the material time and place he was riding his bicycle along the said road when the said lorry coming from the opposite direction suddenly encroached into his path and collided into him. The plaintiff alleged that the collision was caused by the negligence of the defendant in failing to keep proper control of the said motorlorry, driving without due care and attention, failing to slow down or take any evasive action, etc. and most important of all, encroaching into the path of the plaintiff.

The defendant denied any negligence caused to the plaintiff and maintained in his defence that it was caused wholly or substantially contributed to by the plaintiff himself. The defendant alleged that it was the plaintiff who had encroached into the path and right of way of the defendant, that at the material time he was riding his bicycle in an unsteady manner and suddenly "turning from the right to the left as one faces the direction of Kepala Batas in such a manner as to render it impossible for the defendant to avoid the said collision".

The plaintiff gave evidence at the trial. He stated that before the collision he was cycling from Simpang Empat towards Pekan Darat on his way to work at Butterworth. On reaching Permatang Buloh, he was knocked into by the defendant's motorlorry. He was keeping to his left side about a foot from the left edge of the road. The lorry, which was speeding came from the front and hit the front part of the bicycle, his left hand, his back and his head. According to him, the impact was on his left side. Under cross-examination, the plaintiff denied that there was a centre white line dividing the road. He maintained that he was travelling one foot from the edge of the road and that the lorry was already facing him when he first saw it approaching. He disagreed with the suggestion of Counsel for the defendant that the accident occurred as a result of him swerving towards the right hand side of the road in the face of the oncoming motorlorry. In the process, the defendant swerved towards his right to avoid colliding with the plaintiff, resulting in the plaintiff colliding into the near-side of the motorlorry, which later turned back to its proper side of the road.

Wan Mat bin Pawanchik (PW2), who claimed to have witnessed the collision that evening, stated that he was riding his bicycle behind the plaintiff when the accident occurred. He was then about 60 feet behind when he saw a lorry travelling in an unsteady manner (menilau-nilau) and collided into the plaintiff who was cycling on his left side of the road. He saw the plaintiff falling on the grass verge and immediately gave assistance by carrying him. He stopped a passing motorcar and took him to the District Hospital Butterworth. Later he returned to the scene where he met the O.C.S. Kepala Batas Police Station (DW2). Under cross-examinations, PW2 disagreed that under the prevailing condition that evening and from the distance of 60 feet he could not have seen the collision.

The defendant's version was as follows. He was travelling from Pekan Darat to Kepala Batas with his lights on. He saw the cyclist some 30 feet away. Both were travelling on the correct side of the road and as they approached each other the cyclist suddenly swerved and encroached into his path. In order to avoid colliding into the plaintiff, he swerved his lorry to the right and went around him to cut back of his left side of the road. In the process, the

nearside rear wheel of the motorlorry came into contact with the cyclist. He stopped about 40 feet in front and left the scene to return home for fear of his personal safety. On his return to the scene with DW2, he discovered that the front windscreen of the lorry was shattered. Both head lights, signal lights and rear signal lights were broken. The four tyres were deflated. According to him this happened after he left the scene of the accident.

Abdul Hamid bin Malik (DW2), a police pensioner, was then the investigating officer in respect of the accident. On receipt of information about the accident, *vide* Kepala Batas Police Station Report No. 2453/77 (B1), he proceeded to the scene at about 11.40 p.m. where he prepared a sketch plan and its keys D1 and D2. He noticed the damage to the motorlorry as described by the defendant in his evidence. He ascertained from the defendant that the damage was not caused as a result of the accident. He also examined the bicycle and found that the handle was broken and dislodged, the front wheel, front mudguard, right paddle and rear wheel were dented. Later, at the Kepala Batas Police Station he instructed a police photographer to take two photographs of the vehicle (C1).

**A. Liability**

Having considered the conflicting versions of both sides and in the light of the sketch plan and other evidence, I am of the opinion that the collision could not have happened in the manner described by the plaintiff. He stated that he was about one foot from the edge of the road facing Pekan Darat when he saw the defendant's lorry coming towards him. He was hit on the front part of his bicycle with the injuries on the left part of his body and the impact on his left side. For this to happen, this means that before the collision the defendant's lorry was travelling for quite a distance on its wrong side of the road with its four wheels on the sidetable of the plaintiff's left side of the road. To me, this is quite an incredible version. From his injuries coupled with his own admission that the impact was on his left side, it is my primary finding of fact that the collision occurred between his left side and the rear nearside of the lorry. Viewing this in the light of the sketch plan D1, the impact could only have happened on the tarred surface of the road and could not be on the sidetable of the left side facing Pekan Darat.

Secondly, having discounted the respective positions of the motorlorry and the bicycle at the time when DW2 prepared the sketch plan D1, the blood spot at point H in D1 at any rate indicated that the plaintiff must have fallen there upon impact. Admittedly, the blood spot did not conclusively show that it was the actual place of impact, nonetheless, it is a clear indication that the plaintiff must have fallen there and not on the left side of the road facing Pekan Darat. It follows, therefore, from my above finding that the plaintiff failed to prove that he was cycling on his proper side of the road and that the defendant encroached into his path, as alleged in his statement of claim.

I have no reason to disbelieve DW2 who drew the sketch plan when he went to the scene about 3¾ hours after the accident. He was certain about the blood spot at point H, although in other respects, his evidence, particularly the damages to the vehicles, was based on what the defendant had told him. With regard to the evidence of PW2, the so-called eye-witnesses, taking it in the context of the evidence as a whole, I do not believe him that he witnessed the accident whilst cycling about 60 feet behind the plaintiff. In the circumstances of the prevailing conditions that evening - there was utter darkness compounded by his allegation that the lorry was travelling without any lights on - I am in grave doubt as to the truth of PW2 having witnessed the collision. In all probability, he could have been at the scene after the collision. Based on my primary finding that the collision had taken place near point H, the evidence of PW2 cannot be true.

For the above reasons, I find the plaintiff's version improbable. I accept the defendant's version as more probable. Therefore, I find the plaintiff was negligent.

Next, was the defendant guilty of contributory negligence? It is a fact that both the cyclist and the lorry were travelling in the opposite directions and moving towards each other. According to the defendant, he was travelling at about 30 m.p.h. and he first noticed the presence of the cyclist on the road when he was only about 30 feet away from him. As they moved nearer to one another, the plaintiff suddenly swerved to his (plaintiff's) right, and by which time the defendant swerved to his right, then turned to his left and in the process a collision occurred. The defendant stated that he applied his brake slightly. In my opinion, in the circumstances of this case and considering that the surrounding area was a country road (not a main highway), with no street lights, the defendant would have noticed the presence of the plaintiff from a longer distance than, 30 feet. I do not accept his version that he was travelling at 30 m.p.h. and only noticed the plaintiff as he was 30 feet away from him. In the circumstances, had the defendant used his beam lights he could not have avoided seeing the plaintiff beyond 30 feet and should have kept a proper lookout in front. The defendant, in such circumstances or even in the circumstances described by him, owes a duty to move with due care or to slow down or to take evasive action to avoid the collision. This, I find, he has failed to do and as such I find him also to blame for the accident.

In my judgment, on liability, I hold the plaintiff 2/3 and the defendant 1/3 to blame.

**B. Quantum**

**1. History of the Injuries.**

The plaintiff was referred from District Hospital Butterworth to the General Hospital Penang on 1 November 1977 and remained until 6 December 1977 when he asked to be discharged against medical advice. The injuries sustained are set out in the first medical report (A3). While at the General Hospital, he was treated by Datuk D.S. Willie (DW1), formerly the Senior Consultant Orthopaedic Surgeon, who recorded the following finding in his specialist report (D3-9) dated 16 November 1983:

**The left wrist and forearm region**

There was a compound fracture of the radius and ulna with questionable circulation distal to the fracture. There was gross deformity of the anatomy of this region. There was a three-inch ragged, irregular transverse laceration involving the skin, soft tissue and bone. The left ulna was found to protrude beyond the confines of the normal anatomy with the comminuted radius incompletely exposed.

In addition to this there was a one and a half inch linear laceration over the left parietal region. There was also a laceration one inch long on the outer canthus of the right eye. There were abrasions over the left shoulder blade and left hip.

**Right lower limb**

There were a few punctured wounds in the right thigh with subcutaneus swelling and tenderness. The skeleton was intact.

All other systems were within normal limits.

Movements of the injured extremities were restricted due to pain and deformity.

All x-rays were found to be normal except the left forearm. The left forearm x-rays revealed a comminuted compound fracture of the lower end of the radius. The distal part of the wrist was intact. The comminuted lower end of the radius involved the radio-carpal joint (proximal half of the wrist). The distal half of the wrist joint was intact. The inferior radio-ulnar ligament was disrupted.

The plaintiff was operated on the same night. Toilet, debridgement and suture was performed to the disrupted bone and soft tissue. The comminuted fracture dislocation involving the radius was then reduced and immobilized in a plaster of Paris slab. The procedure was carried out under a general anaesthetic. He made a slow but uneventful recovery. As the reduction of the comminuted fracture was not satisfactory the comminuted fractures were submitted to another reduction on 30 November and re-emplacement in a plaster cast. This time the check x-rays revealed more than satisfactory alignment given the circumstances.

The sutures were removed on 14 November and a full plaster reapplied the same day. The plaintiff continued to recover but he insisted on being discharged at his own risk and against medical advice on 6 December 1977. He however was to be reviewed in 2 weeks from thence.

On 29 December it was noted that the plaintiff had taken off the plaster and sought traditional (bomoh) treatment. He was still not keen on standard surgical management and was lost to further follow-up. He merely turned up for further medical leave.

**2. Discharge against Medical Advice.**

It is clear to me that the plaintiff discharged himself from the General Hospital against medical advice at his own risk in order to seek traditional kampong treatment. According to Datuk Sam Willie (DW1) had the plaintiff adhered to medical advice he would not have suffered the present deformity. Further, after seeing the plaintiff again on 14 November 1983, the following points from his specialist report should also be noted:

1. The type of deformity is called Madelung's deformity due to mismanagement on the plaintiff's own volition.
2. "There is absolutely no doubt that the grotesque deformity and restriction that the patient has is directly as a result of his (1) premature removal of the plaster, (2) to massages and manipulation before the comminuted fracture could organize into firm healing and as a result this compromise and collapse, (3) failure to adhere to physiotherapy. All this I am to understand was brought about in an atmosphere of gross mismanagement, which was the personal choice inspite of our warning".
3. If plaintiff followed advise there would have been minimal disturbance.
4. "All that was required of the patient was to retain the plaster of Paris cast immobilisation and attend physiotherapy which was made available to him. It was not difficult even in his socio-economic context to keep the plaster cast on his left wrist which is not a weightbearing joint and avail physiotherapy. He was also advised and cautioned of the inherent complications of non-compliance. Inspite of that he chose to do otherwise.
5. Had he allowed us to preside over the entire proceedings of management of his fracture I am certain we would have established almost, if not normal anatomy and function. There is no question of pain or tenderness now or for that matter in future as a direct result of the deformity.
6. Even now, at this juncture the function of the hand could be greatly improved but the patient appears more preoccupied in search of compensation if any."

Under cross-examination, DW1 stated that had the plaintiff continued at the General Hospital, he would assess his residual disability at 10%.

**3. The Law.**

It is trite that the plaintiff should mitigate his loss and he must not add anything which will aggravate the injuries. *Munkman's Damages for Personal Injuries and Death* 6th Edn., at p. 34 says:

> It is more accurate to say that the plaintiff cannot recover damages for an aggravation or prolongation of his injuries which is due to his own wilful act or neglect.

The burden is on him to show that in all the circumstances of this case, he had acted reasonably in discharging himself against medical advice and opting for traditional treatment. I think the principle involved here is akin to a plaintiff refusing to undergo a recommended medical treatment. In *Selvanayagam v. University of West Indies (PC)* [1983] 1 MLJ 585 Lord Scarman, in delivering the judgment of the Judicial Committee stated at p. 589 para. E:

> The rule that a plaintiff who rejects a medical recommendation in favour of surgery must show that he acted reasonably is based upon the principle that a plaintiff is under a duty to act reasonably so as to mitigate his damage. Their Lordships respectfully agree with the opinion expressed on the point by the High Court of Australia in *Fazlic v. Milingimbi Community Inc*. [1982] 56 ALJR 211, 214 to which they were helpfully referred by Counsel for the plaintiff. The question is one of fact and, as already mentioned, the burden of proof is on the plaintiff.

Based on the opinion of DW1, I am satisfied that the plaintiff's disabilities were aggravated by his discharge against medical advice. Further I find the plaintiff has failed to explain or to call any medical evidence to rebut the opinion of Datuk Willie (DW1).

In this case, the assessment of damages for pain and suffering and loss of amenities will be based on the two medical reports (A3) and (D3-9). Therefore, based on these reports, my assessments are as follows:

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|---|---|
| 1. Lacerations over | a) (L) Parietal region 1 ½" |
| | b) eye over the canthus 1" |
| 2. Abrasions over | a) (L) Scapula 8" x 4" |
| | b) (L) Hip 2" x 3". |

Taking both heads of injuries together and based on comparable awards, I feel an award of RM3,500 would be fair and reasonable.

3. A few punctured wounds over the right mid-thigh with tenderness and subcutaneous swelling present. The movement of the leg was restricted due to pain and swelling.

For the above injuries, I feel an award of RM2,000 for pain and suffering is fair and reasonable.

4. Compound fractures of left radius and ulna with dislocation of the left ulna. There was deformity of the anatomy of this region. The left ulna was found to protrude with the comminuted radius incompletely exposed.

An operation was done. Undoubtedly, this was the most serious injury sustained by the plaintiff. Bearing in mind that his residual ability had been assessed by Datuk Willie to be minimal at 10%, in my judgment, based on comparable awards, a sum of RM8,000 would be fair and reasonable.

See: a) *Chong Teen Thong v. Yap Chen Lean & Anor*. [1975] Unreported. DASS Vol. 2, p. 107.

b) *Oh Kim Siew v. Teo Loon Gee* [1976] Unreported. DASS Vol. 2, p. 1107.

c) *Tan See Peng v. Tang Yong Muang* [1982] DASS Vol. 3, p. 71.

In the circumstances, the total amount for general damage for pain and suffering and loss of amenities shall be RM13,500. But allowing for overlapping which I assess to be RM1,500, the nett amount shall be RM12,000. However since I find the plaintiff 2/3 to blame, he shall only be entitled to a sum of RM4,000. Accordingly, I enter judgment for the plaintiff in the sum of RM4,000 with interest at 6% per annum from date of service of writ until judgment and at 8% per annum from date of judgment until full payment. I make no award for special damage as the plaintiff has failed to prove it strictly.

**Costs:**

Parties agree that the costs be assessed on the fixed scale under the Subordinate Courts Rules 1980. In addition, the plaintiff will be given the full disbursement for one specialist report and for the attendance of Mr. Tan Boon Hoo, the orthopaedic specialist attached to the Lam Wah Ee Hospital, Pulau Pinang.

Also found at [1989] 2 CLJ 492